

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 08-11251-RGS

RICHARD MAX STRAHAN

v.

BRIAN HUSSEY and STEPHEN BIKOFSKY

ORDER ON PLAINTIFF'S MOTION
FOR ISSUANCE OF SUBPOENAS

May 13, 2009

STEARNS, D.J.

Plaintiff Richard Max Strahan seeks the court's authorization of the issuance of subpoenas so that he may "discover and obtain documents and facts that will be used as material evidence at trial." Strahan seeks to subpoena the following persons who are not parties to the litigation: the Commissioner of the City of Cambridge Police Department and the Executive Director of the Massachusetts Bay Transportation Authority, each "for document production"; and an otherwise unidentified David Arsenault "for document production and to appear for deposition." Strahan seeks to have the United States Marshal serve the subpoenas "to insure that they are lawfully served."

Strahan "insist[s] that the District Court rule immediately on [his] Subpoena Request" as he is "eager to prosecute the Defendants. I eagerly seek to ruin them and bring them to justice." In light of Strahan's admission of a vindictive motive in seeking the subpoenas, the court will require him to make a preliminary showing of compliance with Fed. R. Civ. P. 45, including "reasonable steps to avoid imposing undue burden or expense" on the non-parties. (An issuing court is responsible for policing abuses of the

subpoena power and “must enforce this duty.” See Fed. R. Civ. P. (C)(1)). In particular, the court will require Strahan to list the documents he intends to request, see Fed. R. Civ. P. 45(a)(1)(A) (iii), and further will require that he “show a substantial need for the testimony or material that cannot be otherwise met without undue hardship and ensure that the subpoenaed person will be reasonably compensated.” See Fed. R. Civ. P. 45(c)(3)(C)(i) and (ii).¹

Similarly, pursuant to Rule 45(b)(1), Strahan is required to demonstrate his ability to pay all costs associated with service of the subpoenas, including the expenses incurred by the United States Marshal, as well as the witness fees and their travel expenses, if any. Even where courts waive the costs associated with service of a subpoena, it is well-settled that the waiver does not extend to a litigant’s obligation to pay witness fees, travel expenses, or mileage, as required by Fed. R. Civ. P. 45(b)(1).² See, e.g., Matthews v. Cordeiro, 256 Fed. Appx. 373, 375 (1st Cir. 2007) (“[F]ederal courts are not authorized to waive or pay witness fees on behalf of an *in forma pauperis* litigant.”), citing Malik v. Lavalley, 994 F.2d 90, 90 (2d Cir.1993)); Tolbert v. Peeler, 2007 WL 2994771, *1 (E.D. Cal. 2007) (“[I]n *forma pauperis* status does not provide for the payment of witness fees or travel expenses, and the court did not err in denying plaintiff’s motion for a waiver of those costs and fees.”), citing Dixon v. Yist, 990 F.2d 478, 480 (9th Cir.1993)); Malsh v. Police Dep’t. of City of New York, 1995 WL 296735, at *1 (S.D.N.Y. May 16, 1995) (“It is

¹The disclosure and showing may be made by ex parte submission to the court should Strahan so elect.

²See 28 U.S.C. § 1821(b) (setting witness fees, including attendance fee, travel expenses, and mileage allowances).

settled law that in civil cases aside from petitions for habeas corpus . . . a plaintiff who has been granted *in forma pauperis* status still must pay the witness fee and travel costs of a witness subpoenaed pursuant to Rule 45 of the Federal Rules of Civil Procedure”); Badman v. Stark, 139 F.R.D. 601, 604 (M.D. Pa. 1991).³ See also Matthews v. Vargas, 254 Fed. Appx. 1 (1st Cir. 2007) (unpublished decision holding that the district court did not err in declining to issue witness subpoenas because the litigant had not provided the appropriate witness fees under Fed. R. Civ. P. 45(b)(1) and noting that public funds could not be expended on behalf of a private litigant in a civil action).

³The court in Badman stated, in relevant part:

The problem posed by Plaintiff Badman’s request for issuance and service of a subpoena *duces tecum* stems from the service provision in Rule 45(c). The “plain meaning” of Rule 45(c) requires simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena. C F & I Steel Corp. v. Mitsui & Co. (U.S.A.), Inc., 713 F.2d 494, 496 (9th Cir. 1983). So far, the plaintiff has been silent as to how he proposes to pay for this discovery. His filing on July 29, 1991, has included neither forms nor fees. Fees must be tendered concurrently with subpoenas. Tedder v. Odel, 890 F.2d 210 (9th Cir. 1989).

Badman v. Stark, 139 F.R.D. at 604 (emphasis added).

Badman also noted that unlike Rule 17(b) of the Federal Rules of Criminal Procedure (providing for service of subpoenas and payment of witness fees for an indigent criminal defendant), there is no similar provision for the payment of witness fees for an indigent party in a civil action, with the exception of a habeas corpus proceeding or action under 28 U.S.C. § 2255. Id., citing Dortly v. Bailey, 431 F. Supp. 247, 248 (M.D. Fla.1977). In Badman, the plaintiff was required to show some authority before the court would permit processing of his subpoena request, stating that: “[e]ven if Plaintiff Badman only is seeking to have the ‘witnesses’ turn over the requested court records, and does not command their appearance at a formal deposition, the question of fees and costs remains. The Federal Rules of Civil Procedure were not intended to burden a non-party with a duty to suffer excessive or unusual expenses in order to comply with a subpoena *duces tecum*.” Badman, 139 F.R.D. at 605.

ORDER

Strahan's motion for issuance of subpoenas is DENIED, without prejudice, pending his showing of compliance with Rule 45 as directed by this Order.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE